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CLERK OF COURT
YAVAPAI COUNTY, ARIZONA

2010 MAR -4 AM 11:17 ✓

CLERK OF COURT
B. Hamilton

BY: _____

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S SUPPLEMENTAL
MEMORANDUM RE: DEFENDANT'S
MOTION TO PRECLUDE SHOE PRINT
EVIDENCE AND TESTIMONY OF ERIC
GILKERSON

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Supplemental Memorandum re: Defendant's Motion to Preclude Shoe Print Evidence and the Testimony of Eric Gilkerson. The State's position is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The information received from Eric Gilkerson regarding the shoe impression was not inculpatory and, based upon Defendant's motion to preclude it, is clearly not exculpatory. There is no Brady violation.

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963), the United States Supreme Court held that all evidence that is both favorable to the accused and "material to either guilt or punishment," must be disclosed by the prosecutor. The *Brady* Court determined

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1 that failure to disclose this type of evidence is a violation of the accused's Due Process rights.
2 *Brady* does not require that a prosecutor deliver his entire file to the defense, "but only to
3 disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a
4 fair trial." *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380 (1985). "[A]
5 *Brady* violation requires that (1) the evidence at issue is favorable to the accused, either
6 because it is exculpatory or impeaching; (2) the evidence was suppressed by the government,
7 whether willfully or inadvertently; and (3) prejudice ensued." *Strickler v. Greene*, 527 U.S.
8 263, 281-82, 119 S.Ct. 1936, 1984 (1999). A defendant must demonstrate such prejudice in
9 order to satisfy the "material" requirement in *Brady*. *Id.* There is no specific deadline for *Brady*
10 disclosure, rather courts have held that "[a]s long as ultimate disclosure is made before it is too
11 late for the defendant[] to make use of any benefit of the evidence, Due Process is satisfied."
12 *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984).

13
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15 "We have held that, 'the relevant standard of materiality
16 does not focus on trial preparation, but instead on whether
17 earlier disclosure would have created reasonable doubt of guilt
18 that did not otherwise exist.'" The late disclosure of this
19 exculpatory information is troubling, and it highlights the need
20 for vigilance by prosecutors in ensuring that government agents
are informed of and respect *Brady* requirements. ***Ultimately,
however, appellant has not shown that earlier disclosure of
this material would have created any greater doubt about
defendant's guilt or affected the result of the trial.***

21 *United States v. Scarborough*, 128 F.3d 1373, 1376 (10th Cir. 1997) (citations omitted)
22 (emphasis added).

23 The fact the Defendant has moved to preclude or suppress this information clearly
24 demonstrates it is not exculpatory; accordingly, there is no *Brady* violation.

25 At hearing on March 2, 1020, the defense team alleged Defendant has been prejudiced
26 by the so-called untimely disclosure because had the information been disclosed earlier, their

1 defense strategy would have changed. The defense team claimed prejudice is evident because
2 they now have no time to make any necessary adjustments and preclusion of the evidence is the
3 only appropriate sanction. This argument lacks sincerity.

4 It would have been exceedingly premature and arguably unwise for the defense to
5 develop a trial strategy "carved in stone" prior to the conclusions of hearings on the motions *in*
6 *limine*. The issue of the shoe impressions was not litigated until January 14, 2010. On January
7 27, 2010, less than two weeks later, the State discovered evidence that Defendant purchased a
8 pair of La Sportivas which appear to match the impressions left behind Carol's house and next
9 to the bicycle tire tracks. This information was disclosed on January 29, 2010. Defendant has
10 failed to demonstrate how, over the span of just two weeks, such prejudice regarding trial
11 strategy was created as to warrant preclusion of this evidence.

12 The report issued by Mr. Gilkerson indicated that some of the photographs sent for
13 comparison "most closely correspond with" reference material for a La Sportiva shoe. (See
14 Exhibit A.) As there was no *Brady* violation, non-disclosure of material which, up to that
15 point, had no evidentiary value whatsoever, should be considered harmless.

16 More importantly, the Court must recognize the importance of this newly discovered
17 evidence to the State's case. La Sportiva shoes are not common; only four stores in all of
18 Arizona sell this brand of shoe. The Pike's Peak model is no longer available through typical
19 retailers and Detective McDormett was informed that only 3800 pairs of the Pike's Peak model
20 were sold in all of North America. (See Exhibit B.) The fact that Defendant purchased a pair
21 of these shoes and that it appears that this type of shoe "closely correspond with" the
22 impressions left outside Carol's home is pivotal. Any sanction that would effectively suppress
23 this evidence would have devastatingly negative affect on the merits of the State's case.
24
25
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Rule 15.7 of the Arizona Rules of Criminal Procedure authorize the trial court to sanction a party who does not timely disclose material relevant to the case. *If a sanction is warranted, it should have minimal effect on the evidence and the merits of the case. Precluding evidence is rarely the appropriate sanction.*

State v. Towery, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996) (emphasis added).

The relevance of the F.B.I. shoe report was not established until January 27, 2010.

CONCLUSION:

Defendant has failed to demonstrate prejudice for any alleged disclosure violation; therefore the request for preclusion of evidence related to Eric Gilkerson and the shoe impressions should be denied. In the event this Court finds the State has committed a disclosure violation, the sanction of preclusion is not warranted as it will have a devastatingly negative affect on the merits of the State's case. In either event, Defendant's Motion to Preclude this evidence should be denied.

RESPECTFULLY SUBMITTED this 4th day of March, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: 

Joseph C. Butner
Deputy County Attorney

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COPIES of the foregoing delivered this
4th day of March, 2010 to:

Honorable Thomas J. Lindberg
Division 6
Yavapai County Superior Court
(via email)

John Sears
107 North Cortez Street, Suite 104
Prescott, AZ 86301
Attorney for Defendant
(via email)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

By: Web Cornell

STATE'S EXHIBIT A

Report of Eric Gilkerson dated October 22, 2009



FBI Laboratory

2501 Investigation Parkway
Quantico, Virginia 22135

REPORT OF EXAMINATION

To: Phoenix
Squad FRA/Flagstaff RA
Brian C. Fagan

Date: October 22, 2009

Case ID No.: 62D-PX-84240 - 4

Lab No.: 091002004 GK AQ

Reference: Communication dated September 23, 2009

Your No.:

Title: YAVAPAI COUNTY SHERIFF'S OFFICE,
PRESCOTT, ARIZONA
07/02/2008 - SINGLE HOMICIDE;
DOMESTIC POLICE COOPERATION

Date specimens received: October 2, 2009

The following item was received in the Questioned Documents Unit on October 16, 2009:

Q1 Compact disc containing recorded images (1B1, E4420986)

This report contains the results of the footwear examinations.

Results of Examinations:

The footwear impressions depicted in the 5401-5412, 5507-5510, and 5522-5525 images on the Q1 CD most closely correspond with laboratory reference materials for a LA SPORTIVA "Ultrarond GTX XCR" shoe. Descriptive information relevant to this shoe is enclosed herewith.

The footwear impressions depicted in the 5414-5421, 5424-5429, 5434-5437, 5443-5446, 5450-5453, and 5485-5490 images on the Q1 CD lack sufficient detail for a determination of brand name or manufacturer.

Enclosure

The size of the shoe that made the aforementioned impressions was not determined.

Remarks:

The remaining images on the Q1 CD were not used in the comparison.

The submitted item will be returned under separate cover at a later date.

For questions about the content of this report, please contact examiner Eric Gilkerson at 703-632-7315.

For questions about the status of your submission, please contact Request Coordinator Charles Peters at 703-632-7427.



Eric Gilkerson
Questioned Documents Unit

This report contains the opinions/interpretations of the examiner(s) who issued the report.



Manufacturer: LA SPORTIVA
Model Name: ULTRANORD GTX XCR

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John McDormett

From: Fagan, Brian C. [Brian.Fagan2@ic.fbi.gov]
Sent: Tuesday, October 20, 2009 1:46 PM
To: John McDormett
Attachments: lasportiva.jpeg

John,

Enclosed is a picture of the shoe that matches the crime scene impressions. The shoe is LA SPORTIVA "Ultrarord GTX XCR".

Hope this helps,

Brian

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017821



FRIXION® SOLE SYSTEM

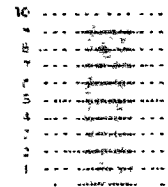
FriXion® sticky rubber is the result of extensive R&D aimed at making superior rubber compounds specifically for mountain sports. FriXion® comes in compounds custom formulated for maximum performance for its intended use. For any mountain performance sport, you can count on FriXion® to give you maximum stick and grip.



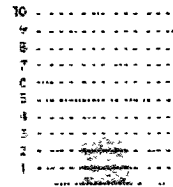
FriXion® RS

Ultra-sticky compound for maximum climbing performance

GRIP

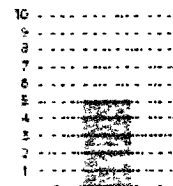
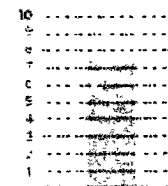


HARDWEARING



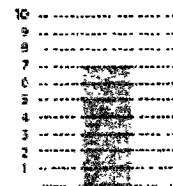
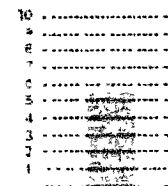
FriXion® XF

Versatile, ultra-sticky compound for the technical and rocky terrain.



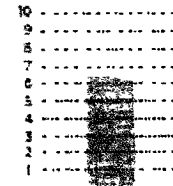
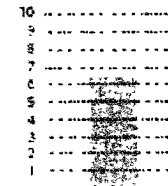
FriXion® AT

Soft and lightweight rubber, totally non-marking, for road and trail running. Specially wear and tear resistant.



FriXion® XT

Used for dual compound soles. Optimum combination of friction, wear and tear resistance and shock absorption, that depends on the tread working surface.



CLOSE



IMCENB NENS



Pikas Post



ULTRA ROAD

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STATE'S EXHIBIT B

YSCO DR 08-029129 Supplement #125

Law Supplemental Narrative:

Seq Name	Date	Supplemental Narratives Narrative
125 McDormett, J	10:59:36 01/29/10	
+Shoes		

A previous attempt at obtaining a shoe size and a manufacturer had been made. A shoe size was not given by the lab (DPS) and the possibilities they gave for the shoe did not match the tread pattern. I contacted the FBI and was put in touch with Eric Gilkerson of the FBI laboratory in Quantico, VA. I sent Eric (Through SA Brian Fagan) a disk of the photos taken of the shoe tread impressions from the scene that went from the bike tracks to the rear of the Bridle Path house and back. A disk of this will be placed into evidence and provided for disclosure. I contacted Eric and asked if he could give me an idea on the shoe size. He said he could not. Eric advised that impressions in the dirt, even with a casting, are often not an accurate representation as to shoe size because often they do not present a true toe to heel representation of the size. Eric did say the impression would be a common size. I asked if a shoe size in the 9-11 range would be a common size, he said it would. Eric advised that a possible match was the La Sportiva Ultra Nord GTX XCR. He said that sole most closely resembled the impression in the dirt. He termed it a hiking boot.

On 11/02/09 I received the report of examination from the FBI.

Deputy Brown and I compared the tread patterns located behind Carol's property and the heel appeared to be an exact representation of this type of shoe. It was harder to determine the forefoot portion although they appeared to be very similar.

Vibram is a company that manufactures soles for shoes. I contacted Vibram (Anne Tommasi / Tommasi 603-893-5878 atommasi@comcast.net) and emailed the sole that the FBI stated most closely resembled the sole pattern on the shoe. I was advised the sole that appeared on that shoe was not theirs as it did not have their branding. I then conducted further research based on the branding of the bottom of the sole of the photo that was sent to me by the FBI. The sole is a "Frixion sticky rubber" sole based on the label on the bottom of the Ultraroad GTX shoe. Anne provided me with a contact for La Sportiva (Jonathon Lantz 303-443-8710 ext 11 jlantz@sportiva.com).

In January 2010 I spoke to Mr. Lantz and learned it is a proprietary sole made in China for La Sportiva. Mr. Lantz, who is the president of the company, advised there are three different models of this shoe, (the Pikes Peak, the Ultraroad GTX, and the Imogene). I had emailed Lantz the photo from the FBI of the sole of the shoes as well as photos 5401-5408 depicting the tread impressions left at the scene. Lantz said the shoes retailed for between \$95-\$135. The models were available at the time of the homicide. They did not sell any other shoes with that type of tread pattern or variations on that pattern. He said it was possible there could be other shoes out there with slight variations but he was not aware of any. I asked if these shoes were sold in Prescott AZ and he indicated they had dealers in Prescott, Phoenix, and Flagstaff. He said he would email me that information. He also advised he would email me photos of the models of the shoes that belonged to that sole. I received the email and what follows are the list of dealers that were sent the Imogene-he indicated the dealers would have also received the other models. The following stores in Arizona sell this type of shoe: BABBITT'S BACKCOUNTRY OUTFITTERS. (928) 774-4775 12 E. ASPEN AVE. Flagstaff; ARIZONA HIKING SHACK (602) 944-7723 11649 N. CAVE CREEK ROAD Phoenix; MANZANITA OUTDOOR LLC (928) 778-0980 PRESCOTT; SUMMIT HUT (520) 325-1554 5045 EAST SPEEDWAY Tucson. I was

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advised that La Sportiva sold approximately 3200 pairs of the Imogene, 1200

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pairs of the Ultranord and 3800 pairs of the Pikes Peak in North America.

Report and correspondence placed into evidence and turned over for disclosure.

On January 27, 2010 detective vip assistant Anne Gordon-Lorentzen spoke with Gareth Richards, the owner of Outdoor Pro-Link, which is located at 1995 North 57th Court, Suite 200, Boulder, CO 80301. Outdoor Pro-Link was listed on DeMocker's Bank of America Credit Card (# 4356520003425856) for a purchase transaction April 26, 2006 (Statement date, May 16, 2006). According to Mr. Richards, the transaction record reflected that DeMocker purchased two pairs of LA SPORTIVA shoes on that date: one pair was a RAJAS and one pair was a Pike's Peak.

Mr. RICHARDS also advised Anne that he was a friend of Mr. DeMocker's when they both worked for Prescott College. Anne was advised that in 1999, RICHARDS was hired by Prescott College's hiring board and that Mr. DeMocker served on that board and was also the Dean.

Mr. Richards advised that the shoes purchased were a men's European size 43.5, which correlates to an American size 10 to 11 (which is in the range of Mr. DeMocker's shoe size).

I spoke to Mr. Richards on 01/28/2010 (recorded) in which the details of the purchase were recounted. See recording for full accounting. Disk placed into evidence and turned over for disclosure. Mr. Richards said his was an online store so the order was an online order. He said the Pike's Peak cost \$47.00 and the Rajas were \$52.50. He said Mr. DeMocker purchased several other items totaling \$333.10. He said the prices are below retail as this site is not available to the general public (it's a site for outdoor professionals). He said you need a password to get into the site and he said Mr. DeMocker had a password to the site because of their friendship. Mr. DeMocker's ProLink account showed two other purchases January 2005 with no detail on what was purchased and May 2007 when sunglasses were purchased.

Richards said he did not speak to Mr. DeMocker before or after the purchase about the purchase of the shoes. He had not spoken to Mr. DeMocker since the homicide. At this point I did not interview Mr. Richards on the details of their friendship although he was open to talking to me in the future. I did not have the feeling he had any animosity toward Mr. DeMocker.

Mr. Richards emailed the online purchase receipt, which is the documentation for the transaction. A hard copy was printed and will be placed into evidence and given for disclosure. The receipt shows the shoes were ordered on 4/22/2006, billed to Steven DeMocker of 1716 Alpine Meadows #1405 Prescott AZ and shipped to Steven DeMocker at UBS, 1560 Plaza West Drive Prescott AZ. The phone number given was 928-713-1919, which was Mr. DeMocker's cell phone number. The user email was sdem@cableone.net. I noticed the receipt did not provide a tracking number so I called Mr. Richards back and he advised he was the middleman and the items would be shipped direct from the manufacturer. He said he would contact La Sportiva in the morning (which will be Friday 1/29/10) and speak to his customer service contact to get the tracking number.

On 1/28/10 I contacted La Sportiva and spoke to Mark Day, who is VP of sales. Mark was somewhat familiar with the situation from Mr. Lantz. Mr. Day confirmed that the Imogene, Ultra Nord, and Pike's Peak are the only three shoes they carry with that type of "bottom package", or tread design. He said these shoes

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have a "very unique" bottom package and no other shoe they sell is similar (in terms of the bottom package). He also said he was not aware of any other shoes from other manufacturers that would have that particular tread design or anything similar. He said that would be "highly unusual". Mr. Day could not expand on the numbers sold in North America that was given to me by Mr. Lantz. He did say the Pike's Peak had a two year production run from December 2005-January 2006 until December 2007. The Ultra Nord also had a two year production run from January 2007 to late December 2008. The Imogene has had a production run from January 2008 to present. Mr. Day said there were no differences in the tread patterns, the style, or the color of the shoes from year to year. The Rajas shoe has a bottom package very different from that of the three other models.

I advised Mr. Day we were not able to locate the Pikes Peak shoe as still being available for sale. Mr. Day also checked and confirmed this. He stated he would mail us a "sample" shoe, which is a shoe their salespeople bring to retailers. He said he would get me as close to the Euro male 43.5 as possible. He also said he would get me an Ultra Nord sample and a full set of Imogene male 43.5 shoes as that is a current production. I offered to make arrangements to pay for the shoes but he declined payment. Mr. Day said he may not be able to ship the shoes out until Monday.

I spoke to Mark Day at La Sportiva on 1/29/10 and they are attempting to find the tracking number. Mr. Day called me back and verified the shoes were shipped 4/25/06 to Steven DeMocker at the UBS address via UPS tracking number 1Z80X029034625711. He will include this documentation with the shoes that will be shipped out. UPS cannot provide, at this point, information regarding that delivery due to the fact the shipment was almost four years ago. Additional investigation on the shoes will be provided in another supplement.

I advised Deb Cowell of all the contacts in this report for disclosure.

Detectives who searched the scene did not locate the Pike's Peak shoe. They did, however, recover the Rajas shoe (male Euro 43.5 US 10.5) in Mr. DeMocker's closet during a search of the Alpine Meadows residence on 7-3-08. Photos were taken of the shoes. The item number is #701.

Investigation ongoing.

Report Approved, T. Boelts #2735, Fri Jan 29 13:49:59 MST 2010

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